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No. 91-544

In The

Supreme Court of the United States

October Term, 1991

IN RE: MBI BUSINESS CENTERS, INC., t/a The Math Box, t/a Micro South Corporation, d/b/a Computer South, t/a Micro Source Financial, Inc.;
IN RE: PRODIGY SYSTEMS, INC.,

Debtors

CAMPBELL'S MOVING COMPANY, INC.,

Petitioner,

v.

MARTIN L. GOOZMAN, Trustee in Bankruptcy for MBI Business Centers, Inc. and Prodigy Systems, Inc.,

Respondent.

Petition For Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATUTES INVOLVED
11 U.S.C. 327(a)

EMPLOYMENT OF PROFESSIONAL PERSONS

(a) Except as otherwise provided in this section, the Trustee, with the Court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons who do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the Trustee in carrying out the Trustee's duties under this title.

11 U.S.C. 364(b)

OBTAINING CREDIT

(b) The court, after notice and a hearing, may authorize the Trustee to obtain unsecured debt other than under subsection (a) of this section, allowable under Section 503(b)(1) of this title as an administrative expense.

11 U.S.C. 503(b)(1)(A)

ALLOWANCE OF ADMINISTRATIVE EXPENSES

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -

(1)(A) The actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

28 U.S.C. 157

PROCEDURES

(a) Each district court may provide that any and all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 shall be referred to the bankruptcy judges for the district.

* * *

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of any party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both Title 11 and other laws of the United States regulating organizations or activities afffecting interstate commerce.

Local District Court Rule 54.A(2)(c)[1]

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[1]The local rules of the United States District Court for the District of Maryland were amended effective July 1989. In addition to substantive changes, the Rules were re-numbered. All references herein are to the Rules in effect during the pendency of the bankruptcy proceedings and reflect the former rule number.

WITHDRAWAL OF REFERENCE OF ADVERSARY PROCEEDING OR CONTESTED MATTER

A motion to withdraw an adversary proceeding or a contested matter which has been referred to the bankruptcy court must be filed by the earlier of five (5) days before the date scheduled for the first hearing on the merits and;

* * *

(11) In the case of a contested matter, within twenty (20) days after the last memorandum is permitted to be filed pursuant to local bankruptcy rule 30(b)(4).

49 C.F.R. 1320.2(a) (1987)

(Reprinted at p. 54, infra.)

49 C.F.R. 1320.3(d) (1987)

(Reprinted at p. 56, infra.)

JURISDICTIONAL GROUNDS

Pursuant to Supreme Court Rule 24.2, the Respondent disagrees that the cause of action arose under 49 U.S.C. 10761(a) and 10762(a)(1) as stated at Pet. for Cert. 6. The Petitioner performed moving services for assets

belonging to a bankruptcy estate. The cause of action arose solely under 11 U.S.C. 503(b)(1)(a), as evidenced by the filing of an application for administrative expenses in the bankruptcy court. Jurisdiction of the United States Court of Appeals for the 4th Circuit was invoked pursuant to 28 U.S.C. 1291 and 1294(1). Jurisdiction of the Supreme Court of the United States was invoked pursuant to 28 U.S. 1254(1).

STATEMENT OF THE CASE

The bankruptcy court's findings of fact are reproduced here from its Memorandum Of Decision, Appendix ("Appx.") to Pet. for Cert. A42-55, as modified by the district court, Appx. to Pet. for Cert. A-18-26. Both the circuit and district courts accepted the statement of facts as found by Judge

Mannes of the bankruptcy court. Appx. to Pet. for Cert. A2-A12; A18-A26. To the extent the Respondent puts forth additional facts, they are included here with references to the circuit court record.

This case was commenced by a voluntary petition under Chapter 11 filed by MBI Business Centers, Inc. (the "Debtor") on September 18, 1987. The Debtor was a retailer of consumer computer equipment which it sold at numerous stores from Boston to Atlanta. Prodigy Systems, Inc., a wholly owned subsidiary of the Debtor, filed its petition on October 13, 1987. On December 18, 1987, the court converted the cases to cases under Chapter 7. Martin L. Goozman (the "Trustee") was appointed trustee of both cases on December 23, 1987.

At the time of the conversion, the Debtor had been operating 22 retail stores as well as three stores located on General Services Administration premises. The stores on government property were known as Office Technology Plus ("OTP") centers. Two of the retail stores, at Waltham, Massachusetts, and Edison, New Jersey, also served as warehouse distribution centers, and the contents of previously closed stores had been collected there.

After his appointment, the Trustee moved swiftly to hire 28 of the Debtor's former employees to assist in liquidating the remaining assets. Among those were Robert Katchmar ("Katchmar"), a former Vice President, and his assistant, Christine Taylor ("Taylor"), who ran the Debtor's main warehouse in Chantilly, Virginia and controlled the

inventory stored there. The court authorized their employment on December 30, 1987.

Shortly before the conversion, IBM engaged PR Logistics Ltd. ("PR Logistics") to establish a bonded warehouse at Chantilly to control its collateral supplied to the Debtor. The conversion of the case rendered this operation pointless. Robert Kresge, president of PR Logistics, thereupon approached Katchmar to offer his company's services in consolidating the Debtor's assets.

In order to formulate a proposal to the Trustee, Ralph Kresge reviewed the Debtor's inventory lists, such as they were, with Katchmar and Taylor. Katchmar and Taylor knew that only the inventory list for the Chantilly warehouse was accurate and that inventory

lists for the 25 retail locations were dubious at best. They told Kresge that the inventory lists could not be relied upon. Nonetheless, Kresge concluded that the 25 retail centers contained an average of 2,000 pounds of inventory. Kresge clung to this conclusion, despite the Trustee's subsequent invitation to visit nearby stores to determine their actual contents. Kresge declined the offer. Ralph Kresge had his brother, Paul, price the proposal based on the 2,000 pound per store figure. Relying on household goods tariffs, Paul Kresge arrived at a cost to move the inventory of $39.25 per 100 pounds, or $785.00 per ton.

Ralph Kresge presented the Trustee with a handwritten and typed proposals, both dated December 29, 1987. The proposals were the same except the

typed proposal contained a breakdown of costs for the services proposed. The proposal offered to move product from the 25 centers to the Chantilly warehouse for $785.00 per center or $19,625.00 total. Additionally, PR Logistics offered to coordinate the liquidation of the Debtor's assets.

The Trustee was only interested in PR Logistics' offer to move the inventory inasmuch as he had already hired the Debtor's former employees to coordinate the liquidation. Since the conversion of the case, the Trustee, in concert with the secured creditors, had considered whether it would be wiser to liquidate the inventory piecemeal from each retail location or to consolidate the inventory and dispose of it through a single sale. The PR Logistics proposal made the latter course feasible and more

attractive than piecemeal liquidation. Had the Trustee known the true cost of the move, he would not have consolidated the assets.

All agreed that PR Logistics was to move the inventory, demonstration computer equipment, and office equipment at the 22 stores. The fixtures and furniture were not to be moved since this consisted for the most part of particleboard furnishings used to display the inventory and was of substantial weight and largely without value. These furnishings would only be of value to potential purchasers of IBM distribution rights possessed by the Debtor who would continue to operate a computer business at the retail location. Additionally, PR Logistics was to move everything in the three OTP centers and the inventory in the Waltham and Edison distribution

centers.

The Trustee prepared an application to employ PR Logistics to move each store for $785.00 and to consolidate the contents of a second warehouse in Chantilly in the main warehouse for a total of up to $20,000.00. The Trustee later revised the maximum allowable cost to $25,000.00 to cover any unforseeable costs. The application stated that each store on average contained $110,000.00 in assets. The Trustee forwarded the application and a copy of the proposed order to Ralph Kresge along with the following declaration which Kresge signed:

Declaration of Mover

I, PR Logistics Ltd. by R.A. Kresge, declare as follows:

1. That I am a duly bonded mover competent to perform the services proposed in the Trustee's application for my employment.

2. That I have read the Application of the Trustee to employ me and I agree to and approve all of the terms and conditions thereof.

3. I am a disinterested person within the meaning of 11 U.S.C. Section 101(13).

I declare under penalty of perjury that the foregoing is true and correct.

PR Logistics, Ltd.
Dated: 1/10/88
By: Ralph A. Kresge /s/

On January 14, 1988, the court authorized the employment of PR Logistics.

Unknown to the trustee, at this time PR Logistics was neither licensed as a broker for transportation nor issued a certificate or permit as a motor carrier as 49 U.S.C. Section 10921 requires. Nonetheless, PR Logistics brokered the move. Paul Kresge called Richard Dameron ("Dameron") of Denver Moving & Storage Company, Inc. ("Denver Moving") and inquired whether it could handle the

proposed moves for $500.00 or $600.00 per store. Dameron informed Kresge that Denver Moving could not perform the move since it was outside Denver Moving's authorized area. However, on January 13, 1988, Dameron called Joseph Campbell ("Campbell") of Campbell's Moving Company, Inc. ("Campbell's") to refer the business. Campbell and Dameron had a long-standing reciprocal relationship as United Van Lines agents. Campbell said he could do the job for $600.00 per store. Campbell knew of PR Lgistics' involvement from the start of the transaction.

Campbell knew that the moves were being done for a bankruptcy trustee within a day or so of January 13, 1988, when he had called Katchmar, and alleges that Campbell's was hired by the Trustee as a result of a telephone conversation

with Paul Kresge on January 19, 1988, when Kresge represented himself as a representative of the Trustee. Dameron, however, understood that PR Logistics was to pay Campbell's since he and Campbell had made the arrangements with PR Logistics, and Paul Kresge would be paying Campbell's. Campbell does not consider that Campbell's was hired by PR Logistics or Denver Moving. In any event, Campbell's was not hired by the Trustee.

Campbell's commenced work on January 21, 1988, by moving the Atlanta retail store and OTP center. Upon learning that the load far exceeded 4,000 pounds, Campbell called Dameron and insisted upon being paid per his tariff. Dameron relayed the information to Paul Kresge who assented to the demand. Dameron thereafter dropped from the picture.

Ralph Kresge became concerned that the amount of material being shipped exceeded his estimate of 2,000 pounds per store. He met with the Trustee and Wendelin Lipp, one of the Trustee's attorneys, on January 27, 1988. They discussed what exactly was to be moved, but not the involvement of Campbell. Katchmar and Allen Ashforth, another of the Debtor's Vice-Presidents whom the Trustee had hired to help in the liquidation, participated via telephone. The parties agreed that the entire contents of the OTP centers and the stores at Waltham, Edison, and Bensalem, Pennsylvania, were to be moved. At the other retail stores, inventory, demonstration equipment, office supplies and equipment, business records, copiers, postage meters, facsimile machines, and overhead projectors were to be moved.

Kresge assured the Trustee that the specified move would cost $25,000.00 or less. He never mentioned that PR Logistics would charge $39.25 per 100 pounds for the move.

The Trustee again advised Kresge that he was totally unaware of what was contained in Waltham and Edison (Tr. P518 L9-P520 L3). As such, Kresge was admonished not to move anything which would cause the cap of $25,000.00 to be exceeded without first communicating back to the Trustee (Tr. P475 L21-P476 L4, P523 L4-7). Kresge, however, indicated that there was no problem insofar as exceeding the cap was concerned (Tr. P470 L6-P471 L7, P522 L13-17). The Trustee was at this time still unaware that PR Logistics was not personally performing the physical moving operation.

Campbell's continued moving the

stores. One of the Debtor's former employees retained by the Trustee would open a store, indicate what had to be moved, and sign the bill of lading. The load would be delivered to Chantilly where Katchmar or Taylor would sign the bill of lading acknowledging delivery. At this time, no charges were on the bills of lading. Katchmar coordinated the move with Campbell's, scheduling the timing of the moves and arranging to have the stores opened.

Katchmar knew that Campbell's was performing the moves instead of PR Logistics. Katchmar had also known that PR Logistics did not intend to perform the move when it had submitted its proposal. Yet Katchmar never told the Trustee any of this information. However, Katchmar had not been involved in PR Logistics' proposal negotiations

with the Trustee. Katchmar was familiar with PR Logistics' flat rate proposal and, while aware of Campbell's involvement, assumed that Campbell's was simply doing the moving jobs for PR Logistics pursuant to the flat rate proposal.

Approximately two-thirds through the move, Campbell became concerned that his firm might not get paid. Paul Kresge had been pressing Campbell's for invoicing information, and Campbell had been evasive as to what the charges would be. Campbell queried Katchmar and learned the Trustee's telephone number. Campbell called the Trustee's office on February 11, 1988, and spoke with Wendelin Lipp, Trustee's counsel, stating that Campbell's had performed $100,000 worth of work and sought assurance of payment. Lipp

informed Campbell that the Trustee had not hired his company and that Campbell's would have to look to PR Logistics for remuneration. Campbell's never billed PR Logistics. Campbell's never contacted the Trustee again until billing him, but continued with the move.

The invoices submitted by Campbell's indicate that between January 23, 1988 and February 11, 1988, Campbell's had moved 224,510 pounds for a total non-discounted amount of $86,761.27 (original invoices provided a 25% discount for an aggregate discounted cost of $65,070.95) (Exhibits in circuit court record ["Ex."]) pp. 530-54). The invoices submitted by Campbell's further indicate that subsequent to February 11, 1988, on February 18, 1988 and February 24, 1988, Campbell's moved an additional 146,700 pounds at a non-discounted cost

of $59,471.99 (original invoices provided a 25% discount for an aggregate discounted cost of $44,603.99) (Id).

After speaking with Campbell, Lipp called PR Logistics and spoke with Paul Kresge, who disavowed any knowledge of Campbell's. Ralph Kresge returned Lipp's call and told her not to worry, that Campbell's was his responsibility, that the move was progressing nicely, and that the job would not cost more than $25,000.00. Katchmar and asked what was going on. Katchmar continued to coordinate the move, which concluded on February 25, 1988.

The move was greater than anticipated and over 300,000 pounds of goods were moved. A large portion of this weight was attributable to particleboard furniture moved from the Waltham and Edison distribution centers.

The invoices submitted by Campbell's indicate that Campbell's moved a combined weight of 173,060 pounds from both the Waltham and Edison centers for a total non-discounted cost in the amount of $61,531.80, $46,140.85 discounted (Ex. pp 530-54).

The Trustee was able to sell the Debtor's assets, consisting of the moved goods and the much larger amount of goods already present at Chantilly, for $2,850,000.00. Of that price, $25,000.00 was allocable to the furniture.

PR Logistics sent the Trustee an invoice dated February 11, 1988 for $19,686.00, corresponding to the proposal. The Trustee paid the bill. PR Logistics then sent an invoice dated March 21, 1988, seeking $131,840.77 based on a rate of $39.25 per 100 pounds moved. This was the sum sought in PR Logistics'

application for administrative expenses filed in the bankruptcy court.

Campbell's sent the Trustee an invoice dated March 3, 1988 for $110,329.26 based on a 25% discount on the tariff rate as calculated by Campbell's. Subsequently, Campbell's sent the Trustee another invoice also dated March 3, 1988, for $149,968.41, which does not include the discount. The second sum was sought in Campbell's application for administrative expense filed in the bankruptcy court. Campbell's has since amended its application asking for $208,378.50, which includes interest and expenses incurred during the pendency of the proceeding.

The bankruptcy court denied the application of FR Logistics and, further, ordered it to repay the amount previously paid to it, $19,686.00, to the Trustee,

and allowed Campbell's an administrative claim in the amount of $100,000.00.

The bankruptcy court found that the matter appeared to be one requiring consideration of both Title 11 and Title 49, that jurisdiction of matters brought under Title 49 lies with the district court pursuant to 28 U.S.C. 1337, Appx. to Pet. for Cert. A58-A61, and that Campbell's did not seek withdrawal of the reference as it was entitled pursuant to 28 U.S.C. 157(d) and Local District Court Rule 54.A(2)(c). Id. The bankruptcy court then found that Campbell's application for administrative expenses was not made pursuant to Title 49, United States Code, but rather pursuant to Title 11, United States Code, specifically section 503(b)(1)(A), and that in the context of an application for administrative expense, "the provisions

of Title 49, do not take precedence over those of Title 11," Appx. to Pet. for Cert. A60-61.

The Trustee appealed both the allowance of an administrative expense to Campbell's and the amount of the allowance. Campbell's cross-appealed the denial of its full tariff rate.

The district court overturned the bankruptcy court decision in part and awarded Campbell's an administrative claim in the amount of $25,000.00, with $5,314.00 thereof to be paid by the Trustee and $19,686.00 thereof to be paid by PR Logistics. The district court agreed that Title 11, not Title 49, controls this action. Appx. to Pet. for Cert. A27.

In overturning the prior opinion, the district court stated,

> . . .This court is unconvinced that a moving expenditure totalling nearly

20% of the total amount of money collected is beneficial to the estate. The Trustee had made an agreement with PR Logistics to move the assets of the estate based upon the cost estimate of $25,000.00. The move, if it had cost $25,000.00, would have been benefical to the estate. However, a move which costs in excess of $100,000 could only be considered detrimental and an expense which was incurred primarily in the interest of the claimant. Patch Graphics, 58 B.R. at 745 (Bkrtcy. W.D. Wis. 1986). Accordingly, the $100,000 moving expenses do not qualify as an administrative [expense] under section 503(b)(a). (footnote omitted).

* * *

...bills of lading were signed at all but 7 locations. (citation omitted) The bills had Campbell's name at the top. Significantly, however, the bills of lading do not indicate the charges incurred by the move or the tariff rate.

* * *

...Katchmar and the other MBI employees were agents of the Trustee... However, it is significant that the bills of lading were not filled out when signed. Katchmar and the other employees believed that the move would cost a flat fee of $25,000. The fact that the bills of lading were blank substantiated that

> understanding. Moreover, although Katchmar knew that Campbell's was working with PR Logistics on the move, he was never informed that Campbell's was working under a different agreement than the one originally signed with PR Logistics.
>
> * * *
>
> ...Campbell's services were authorized through agency principles. Indeed, the work Campbell's performed benefitted the estate in the same way that PR Logistics services would have benefitted the estate. Therefore, the only solution to this dispute is that the estate should compensate Campbell's for the work performed pursuant to the terms of the agreement signed by PR Logistics.
>
> * * *
>
> ...[T]he terms of that agreement govern the operation of the move from the outset, and cannot be changed in the interim based upon unauthorized acts committed by Ralph Kresge and PR Logistics.

Appx. to Pet. for Cert. A31-38.

Campbell's appealed the district court's denial of compensation at its full tariff rate. The Trustee appealed Campbell's entitlement to an

administrative award.

The fourth circuit affirmed the district court opinion by "agree[ing] with the reasoning and conclusions set forth in the opinion of the district court, ..." Appx. to Pet. for Cert. A15.

The court added, however,

> A few salient facts are worth reiterating, however. Campbell's never contracted with, nor even spoke to, the bankruptcy trustee directly, nor did Campbell's ever inform the Trustee or his employees that Campbell's would demand payment of its tariff rate. Furthermore, Campbell's never sought nor obtained the advance approval of the bankruptcy court.
>
> Campbell's failed to take the steps necessary to insure payment of its tariff rate. Campbell's is not now entitled to an order compelling the Trustee to pay more than eight times the price he agreed to pay for the transportation of the assets of the bankruptcy estate.

Appx. to Pet. for Cert. A15-16.

Campbell's Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

Campbell's petition identifies one question presented. It argues that this Court should grant the Writ to decide whether a trustee in bankruptcy is exempt from the provisions of Title 49, United States Code in the shipment of estate assets. It argues that the court of appeals decision conflicts with decisions of this Court and with decisions of other circuits. The Writ should be denied for two reasons.

First, the opinion of the court of appeals is not in conflict with the recent decision of Maislin Industries, Inc., Et Al. v. Primary Steel, Inc., 497 U.S. _____ (1990), or any other opinion of this Court interpreting Title 49, United States Code. The application was not filed under Title 49. The court of appeals decision in this case rests

entirely on Title 11, not Title 49. Campbell's has cited no decision under Title 11 which awards a carrier the amount of its filed tariff schedule on an application for administrative expenses, and no case has been found by the Trustee.

Second, even if this Court were to hold that Title 49 and Title 11 may be harmoniously construed and imposed on a trustee in bankruptcy in the context of an application for administrative expenses, the facts of this case dictate that the imposition of the filed tariff schedule is not warranted. Campbell's was never employed by the Trustee. It never contracted with the Trustee to perform the services rendered. The services did not benefit the estate commensurate with the amount of the tariff charges. Furthermore, Campbell's

engaged in unreasonable practices in its conduct in the moving transactions. Accordingly, even if the Writ were granted, this Court could not resolve this case by holding that the aforesaid statutes may be harmoniously construed.

A. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR WITH DECISIONS OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

In Maislin, this Court reaffirmed the viability of the filed rate doctrine of Title 49, United States Code. However, neither Maislin nor any case cited by Campbell's throughout the pendency of these proceedings has involved facts similar to those presented by the instant case. Maislin involved collection of prepetition freight undercharges by a carrier's trustee in bankruptcy. The undercharges had resulted from the shipper paying the

carrier a negotiated rate in an amount less than the carrier's filed tariff schedule. This case involves a carrier's compensation on an application for administrative expenses filed in bankruptcy court pursuant to 11 U.S.C. 503.

Campbell's has cited no case which held that Title 49 prevails over Title 11 in administrative expense litigation commenced and litigated in the bankruptcy court. Each of the lower court opinions held that this matter was properly decided under Title 11, United States Code. The cases interpreting the filed rate doctrine of 49 U.S.C. 10761, mandated by this Court in Louisville and N.R.R. Co. v. Maxwell, 237 U.S. 94 (1915) and its progeny through Maislin have been determined solely upon Title 49, United States Code. This case was decided

solely under Title 11, United States Code. There is, therefore, no conflict.

Campbell's application for administrative expenses was filed under 11 U.S.C. 503(b)(1)(A). It invoked bankruptcy court jurisdiction under 28 U.S.C. 1334(b) and Local District Court Rule 51. The application was a core proceeding under 28 U.S.C. 157(b)(2)(A). An action which invokes the bankruptcy court's jurisdiction must be decided pursuant to the provisions of Title 11, even in the face of competing or conflicting federal law. Cf. N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513 (1984) (rejection of collective bargaining agreement not a violation of 8(d) of National Labor Relations Act, in part, because of policy of bankruptcy code to give debtor-in-possession some flexibility and breathing space); In re

Arthur, 86 B.R. 98 (Bkrtcy. W.D. Mich. 1988) (Title 11, United States Code takes precedence over Title 12, United States Code, in part, because Chapter 12 bankruptcy is designed to give family farmers a fighting chance to reorganize).

Despite the bankruptcy context of this administrative proceeding, Campbells has consistently maintained that it is entitled to be compensated pursuant to its filed tariff schedule and not pursuant to 11 U.S.C. 503(b)(1)(A), the bankruptcy statute upon which its case against the Trustee is grounded. Campbell's contends its claim is asserted pursuant to the filed rate doctrine of 49 U.S.C. 10761. Campbell's had the opportunity to remove the case to the district court since the case apparently involved a consideration of both Title 11 and other laws of the United States

effecting interstate commerce, pursuant to 28 U.S.C. 157(d) and pursuant to Local District Court Rule 54.A(2)(c). The application for administrative expenses remained in the bankruptcy court, however, and was therefore decided under the Bankruptcy Code.[2]

Each of the lower courts held that Title 11, not Title 49, controlled this action. Appx. to Pet. for Cert. A-15., A-26-27., A-57-61. It is therefore not the case, as argued, that the provisions of the filed rate doctrine had been relaxed or ignored, Pet. for Cert. 19-20., 22., by any of the lower courts when deciding this case.

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[2]Subsequent to the decision of the bankruptcy court, Campbell's filed a lawsuit against the Trustee in the district court, Case No. HAR-91-76, grounded in Title 49, United States Code. The prosecution and defense of this lawsuit has been stayed by consent of the parties pending the outcome of the appeals hererin.

A trustee in bankruptcy represents the creditors and has a duty to maximize the value of the estate to provide for an equitable distribution of estate property to creditors. Louisiana World Exposition v. Federal Insurance Co., 858 F.2d 233, 246 (5th Cir. 1988); see also, In Re Wilson, 94 B.R. 886, 892 (Bkrtcy. E.D. Va. 1989). The framework which governs the work of the Trustee is the bankruptcy code. Id. Insolvency is a most important and material fact, not only with individuals but with corporations. With the latter as with the former, the mere fact of insolvency may change radically and materially its rights and obligations. Commodity Futures Trading Comission v. Weintraub, 471 U.S. 343, 357 (1985).

A carrier cannot enforce its tariff against a debtor in bankruptcy

since so doing would frustrate the priority of equal distribution to the debtor's creditors. See generally, Roll Form Products, Inc., 662 F.2d 150 (2nd Cir. 1981); In Re Penn-Dixie Steel Corp., 6 B.R. 817 (Bkrtcy. S.D.N.Y. 1980), aff'd 10 B.R. 878 (D. S.D.N.Y. 1981). Campbell's argues that the lower courts erred by relying on these cases since these cases dealt with prepetition debt. Pet. for Cert. 16-17. This reliance is not error. Each case demonstrates the impact of bankruptcy on the collection of a full tariff rate.

Title 11 also prevailed over Title 49 where the bankruptcy court for the Southern District of New York enjoined a carrier's efforts to collect prepetition freight charges directly from the debtor's consignees stating, "[T]he rights and duties created by the

Interstate Commerce Act are for the protection of the public against secret rebates and discriminations rather than for the enrichment of the carrier....the instant proceeding involves an attempt by [the carrier] to wrongfully enrich itself by utilizing the ICA to circumvent the orderly asset distribution scheme mandated by the bankruptcy code." In re Chateaugay Corp., 78 B.R. 713, 721 (Bkrtcy. S.D.N.Y. 1987). While Chateaugay also involved the collection of prepetition freight charges, it illustrates the impact of bankruptcy upon the collection of prepetition freight charges owed by the debtor, with collection efforts aimed at nondebtor consignees being stayed so as not to interfere with the orderly distribution of estate assets.

The bankruptcy cornerstone

policy of equality of distribution to creditors again led to the provisions of Title 11 prevailing over Title 49 where a trustee was allowed to recover a preference under 11 U.S.C. 547 from a carrier, even though the recovery would result in the carrier not being paid its full tariff rate pursuant to its filed tariff schedule. See, In Re Service Bolt & Nut Co., Inc., 98 B.R. 759, 762 (Bkrtcy. N.D. Ohio 1989). (bankruptcy court must have the power to protect its jurisdiction to assure that the fundamental policies of bankruptcy law are subserved).

Campbell's contention that bankruptcy law is inapplicable to the facts of this case is predicated on a characterization of facts not supported by the record. Campbell's was not employed by the Trustee. The Trustee

employed PR Logistics to perform the moving services. The fact that PR Logistics was an unlicensed transportation broker is not relevant. PR Logistics was not hired by the Trustee to broker the moves, but rather to perform the moving services. Moreover, PR Logistics misrepresented its capacity to both the bankruptcy court and the Trustee. Appx. to Pet. for Cert. A75. The actions of PR Logistics, not the actions of the Trustee, led to Campbell's involvement.

Campbell's assertion that "[o]n January 21st, 1987, pursuant to the instructions of an agent of the Trustee in Bankruptcy, Campbell's began picking up the goods of the estate and delivering them to a central warehouse in Chantilly, Virginia," Pet. for Cert. 8. (emphasis added), is evidence of this

mischaracterization of fact, and is squarely contraverted by the district court opinion that "[t]he terms of [the] agreement [between the Trustee and PR Logistics] governed the operation of the move from the outset, and cannot be changed in the interim based upon unauthorized acts committed by Ralph Kresge and PR Logistics. Appx. to Pet. for Cert. A-38 (emphasis added).

None of the lower courts ever lost sight of the fact that moving services were used by the Trustee only after he performed a cost-benefit analysis which did not consider the cost of moving services in the amount sought by Campbell's, and that the Trustee accepted PR Logistic's bid in the amount of $25,000.00 for moving services concluding, as a result of that bid, that consolidation of the assets was feasible.

Appx. to Pet. for Cert. A-15., A-31.-32., A-46. Campbell's has never acknowledged the significance of these facts, but instead baldly maintains that a carrier is not responsible for a shipper's profit or lack thereof, Pet. for Cert. 20-21., and that it is absolutely entitled, under the filed rate doctrine, to be paid by the Trustee pursuant to its filed tariff schedule. The essence of Campbell's argument is an outright denial that a trustee in bankruptcy is obligated to perform his duties pursuant to the bankruptcy code and a denial of the fact that it was not employed by the Trustee.

It is respectfully submitted that the circuit court decision was correctly decided under Title 11, United States Code. The decision fully recognized the filed rate doctrine of Title 49, United States Code and is not

in conflict therewith, nor with any case construing Title 49, United States Code. This court should deny the Writ on this ground alone.

B. EVEN IF THIS COURT WERE TO FIND THAT TITLE 49, UNITED STATES CODE IS HARMONIOUS WITH TITLE 11, UNITED STATES CODE, CAMPBELL'S MOVING COMPANY, INC. IS NOT ENTITLED TO ITS FULL TARIFF RATE IN THIS CASE.

A decision by this Court that provisions of Title 49, United States Code apply to an application for administrative expenses under Title 11, United States Code would not resolve the case between Campbell's and the Trustee.

1. Campbell's Moving Company, Inc.'s full tariff rate would not be allowed as an administrative expense of the bankruptcy estate.

Under the facts of this case, the amount of Campbell's filed tariff schedule would not be allowed as an administrative expense. The Trustee did

not hire Campbell's to perform any services for the estate. The Trustee never agreed to pay Campbell's filed tariff schedule. Cf. In Re Jartran, Inc., (Jartran 1), 732 F.2d 584, 587 (7th Cir. 1984) (a debt accorded administrative priority under 11 U.S.C. 503(b) must arise from a transaction with the trustee); accord, In Re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976).

Campbell's employment was not approved by the bankruptcy court pursuant to 11 U.S.C. 327(a) as the employement of a professional person or pursuant to 11 U.S.C. 364(b) to enable the Trustee to incur unsecured debt.[3]

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[3]It is acknowledged that the Trustee has not prevailed in the lower courts on his argument that Campbell's employment required approval as a professional person. However, the court of appeals commented, as a salient fact, that "Campbell's never sought nor obtained the advance approval of the bankruptcy

(Footnote continued)

Under Title 11, United States Code, an administrative claim as a priority claim mandates strict scrutiny by the court to keep fees and expenses at a minimum so as to preserve the estate for the benefit of all creditors. In Re Patch Graphics, 58 B.R. 743, 745, (Bkrtcy. W.D. Wis. 1986); In Re O.P.M. Leasing Services, Inc., 23 B.R. 104, 121 (Bkrtcy. S.D.N.Y. 1982). The amount of an administrative claim is determined by the actual value received by the estate from the alleged services. Id. Costs incurred by an administrative claimant are not relevant to a determination of

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[3](continued)
court." Appx. to Pet. for Cert. A-16. It is submitted that an expense in the amount of Campbell's tariff rate required, at minimum, notice to creditors and prior authorization of the bankruptcy court pursuant to 11 U.S.C. 364(b). Cf. In Re Glover, Inc., 43 B.R. 322 (Bkrtcy. D. N.M. 1984) (quoting H.R. No. 95-989, 95th Cong. 2nd Sess. 57 (1978), U.S. Code

(Footnote continued)

the value of an allowed administrative claim. Patch, supra at 746. Likewise, as found by all of the lower courts, the filed rate doctrine of title 49 is not relevant to such determination in administrative expense litigation commenced and litigated in the bankruptcy court.

Campbell's services were not necessary to the preservation of the estate. See generally, Patch, supra; O.P.M. Leasing Services, supra. PR Logistics' proposal made consolidation of the assets feasible rather than liquidation of the assets from several locations. An alternative plan had been discussed and would have been instituted had the true cost of the move been known to the Trustee and the secured creditors.

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[3](continued)
Cong. & Admin. News 1978, pp. 5787, 5843.)

Appx. to Pet. for Cert. A46. It was not necessary to employ a mover when the costs incident to the mover's services were such to render consolidation not feasible. It was not necessary to consolidate the assets in order to liquidate them and preserve the estate.

Much of the poundage moved by Campbells was of nominal value, particleboard furniture moved primarily from the Waltham and Edison distribution centers. Of the total 371,210 pounds moved by Campbells, 146,700 pounds were moved from Waltham and Edison. The inventory and equipment involved in the consolidation effort involved a limited amount of new inventory, and primarily involved demonstration inventory and internal use equipment. (Transcript in circuit court record ["Tr."] P506 L6-13). The new inventory sold for approximately

$.34 per dollar cost value and the used and demonstration inventory and equipment sold for approximately $.24 per dollar cost value. (Tr. P 526 L5-9). The majority of the Debtor's new inventory was already located at the Chantilly warehouse. While the Trustee sold the Debtor's inventory, equipment, and furniture for the amount of $2,850,000.00, only $25,000.00 of the price was allocable to the furniture. Moreover, the sale was comprised of assets already present at the Chantilly warehouse. Appx. to Pet. for Cert. A-53-54. Campbell's, therefore, performed extensive work moving worthless assets.

The Trustee and the secured creditors had determined the feasibility of the consolidation effort based on the $25,000.00 fee arrangement with PR

Logistics. The Trustee would not have employed any mover had he known the assets would be moved at tariff rates. Campbell's argues that a cost-benefit analysis is meaningless to determine the value of services once the services have been rendered. Id. Absent bankruptcy, this argument has merit. A post-fact analysis was not being done, however. A cost-benefit analysis must be performed before incurring an administrative expense in bankruptcy. Cf. Patch, supra; O.P.M. Leasing Services,, supra. This is exactly what the Trustee did in this case, as upheld by the circuit court.

It is respectfully submitted that the amount of the administrative claim allowed to Campbells, $25,000.00, is appropriate and commensurate with the actual value received by the estate from its services. Accordingly, even if Title

49, United States Code would apply to an application for administrative expenses filed under Title 11, United States Code, the standards for the allowance of an administrative claim would not result in the allowance of a claim in the amount of Campbell's filed tariff schedule.

2. Campbell's Moving Company, Inc. is not otherwise entitled to be paid its full tariff rate.

Alternatively, Campbell's did not prove it was otherwise entitled to be paid its full tariff rate.

Both the bankruptcy court and the district court found that Campbell's did not supply any evidence to show that it participated with the tariff placed in evidence, to wit: ICC HGB 400-E. Tariff No. 101-C ICC HGB 101-C, showing the carriers to which HGB 400-E applies was not put in evidence. Appx. to Pet. for Cert. A-37; A-74.[4]

Campbell's practices in the conduct of the moving transactions at issue were unreasonable. This Court in Maislin left unresolved whether a carrier's unreasonable practice justifies departure from the filed rate doctrine. Maislin Industries, U.S., Inc. supra, Slip Op. No. 89-624 at 11-12. As this Court stated:

> The [ICC] argues that under the filed rate doctrine, a finding that a carrier engaged in an unreasonable practice should, like the finding that a filed rate is unreasonable, disentitle the carrier to collection of that filed rate. We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule. But we need not resolve this issue today....

Id. (emphasis added). This Court

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[4]Further, the district court denied Campbell's motion to supplement the record with Tariff No. 101-C, ICC HGB 101-C, pursuant to F.R. Civ. P. 52(b). Appx. to Pet. for Cert. A37.n.5.

overturned the Negotiated Rates[5] cases on the ground that the carrier does not engage in an unreasonable practice when it attempts to collect the filed rate after the parties have negotiated a lower rate. See generally, Maislin, supra.

This case presents five (5) instances of unreasonable practice warranting deviation from the filed tariff schedule.

First, the bankruptcy court found that Campbell's did not follow the tariff in regard to the cost of containers and packing rates. Appx. to Pet. for Cert. A-74. Campbell testified that it is common industry practice to

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[5] NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C. 2d 99 (1986) (Negotiated Rates I); NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C. 2d 623 (1989) (Negotiated Rates II).

obtain a customer's prior authorization for additional services and supplies, evidenced by the customer's signature on an "Addditional Services Performed" form. He further testified that no signatures were obtained on such forms, either from the Trustee or anyone else involved in the moving operation (Tr. P358 L7-19, P361 L5-8). No evidence was thus proferred to show that any additional services were ordered or authorized, yet Campbell's attempts to be compensated for such services.

Second, the first invoices sent by Campbell's to the Trustee, dated March 3, 1988, amounted to $110,329.26 and included a 25% discount from the applicable tariff rate. Subsequent thereto, Campbell's submitted to the Trustee a second set of invoices, also dated March 3, 1988, which amounted to

$149,968.49, not discounted. Campbell testified that the 25% discount had been originated by mistake (Tr. P338-39) and that the higher bill was the correct amount due. It defies reason that an experienced moving company as Campbell's would make such a mistake. It is doubted that Campbell's routinely submits bills which understate its charges by an amount in excess of $35,000.00.

Third, although Campbell testified that it is common industry practice to obtain both tare and gross weights at the same weigh station (Tr. P367-68), half the invoices submitted indicate that Campbell's did not obtain gross and tare weights at the same weigh station. This presents serious questions regarding the accuracy of the weight of the assets as stated on the bills of lading.

Fourth, Campbell's apparently

violated both federal regulations and the provisions of its own bills of lading by both its extension of credit to the Trustee and its release of the assets prior to payment. The bills of lading state that, "credit will not be extended without approval in advance of shipment." The applicable federal regulation in force at the time of the moving transactions in this case, contained at 49 C.F.R. 1320.2 (1987), stated as follows:

EXTENTION OF CREDIT TO SHIPPERS.

(a) Authorization to extend credit.

(1) A carrier that meets the requirements in paragraph (a)(2) of this section may -

(i) relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) extend credit in the amount of such charges to those who undertake to pay them (such persons are called "shippers" in this part)

(2) For such authorization, the carrier shall take reasonable actions to assure

payment of the tariff charges within the credit periods specified -

(i) in this part, or

(ii) in tariff provisions published pursuant to the regulations in paragraph (d) of this section. (emphasis added.)

It is undisputed that Campbells made no arrangements with the Trustee in regard to any extension of credit for moving services as required by its bills of lading. Furthermore, Campbell's took no reasonable actions to assure payment of the tariff charges prior to relinquishing possession of the assets. While one may not surmise why Campbell's undertook to move the assets of the bankruptcy estate without making any arrangement at all for payment, the fact remains that it did so, and now seeks to assess the Trustee its full tariff rate for such services. In point of fact, after being told by Ms. Lipp that Campbell's had not been employed by the

Trustee and had no authority to be in possession of estate assets, Campbell continued with the move by his own design since, according to the evidence, Campbell's was "into this job so far already." (Tr. P316 L21-P317 L5, P398 L8-14).

Fifth, Campbell's apparently violated additional federal regulations by its untimely submission to the Trustee of invoices for its services. The applicable federal regulations in force at the time of the moving transactions in this case, 49 C.F.R. 1320.3(d) (1987), stated as follows:

PRESENTATION OF FREIGHT BILLS

(d) When the carrier lacks sufficient information to compute tariff charges.

(1) When information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at its billing point, the carrier shall present its first bill for payment within seven days following the day upon which sufficient information becomes available at the billing point. This

time period does not include Saturdays, Sundays, or legal holidays.

Campbell testified that in accordance with industry practice the bills of lading used to support the tariff charges were blank when signed by a representative of the Trustee, (Tr. P356 L6-14), but were later calculated at his office (Tr. P356 L15-19). The moves in question commenced on January 23, 1988. Despite the aforereferenced regulation, no freight charges were submitted to the Trustee until at least March 3, 1988, a point in time in excess of the period in which Campbell's was required to submit said invoices.

Instances four and five create serious questions regarding Campbell's motivations in performing the moves. Each involves the possible violation of federal regulations which, if complied with, would have resulted in the Trustee

being confronted by Campbell's presence early in this matter, as opposed to two-thirds of the way through. It will never be known whether the case would have progressed as it did had Campbell submitted timely invoices to the Trustee. Moreover, as found by the bankruptcy court, "Paul Kresge had been pressing Campbell's for invoicing information and Campbell had been evasive as to what the charges would be, Appx. to Pet. for Cert. A-52, and that, "Campbell's should have made clear on what basis it would bill." Appx. to Pet. for Cert. A-64-65.

The foregoing are examples of unreasonable practices by Campbell's in the rendering of services in the consolidation effort, and compel the conclusion that it would be inequitable to allow Campbells compensation pursuant to its full tariff rate. Cf.

Consolidated Freightways Corp. of Deleware v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971).

The filed rate doctrine was enacted to correct the evil of discriminatory transportation practices. The Interstate Commerce Act "embodied a wide reaching and sweeping scheme to prohibit unjust discrimination in the rendition of like services under similar circumstance and conditons, and to prevent undue or unreasonable advantages to those involved in the business of interstate commerce." 1 Collier on Bankruptcy (15th ed.) 5.37 at 5-158. It is believed, and therefore alleged, that Campbell's conduct during the course of the moving operations has been with a design to take advantage of a situation with which it became confronted, at the expense of the bankruptcy estate of MBI

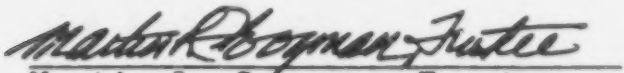
Business Centers, Inc. Campbell's is attempting to wield the sword and shield of the filed rate doctrine, Consolidated Freightways Corp. of Delaware v. Admiral, supra, to obtain compensation pursuant to its filed tariff rate. As held by the district judge, however, "... a move which cost in excess of $100,000 could only be considered detrimental and an expense which was incurred primarily in the interest of [Campbell's]. Appx. to Pet. for Cert. A31.32. (emphasis added); see also, Patch, supra at 745.

For the foregoing reasons, Campbell's is not otherwise entitled to be paid the amount of its filed tariff schedule, and the Writ should be denied.

CONCLUSION

For the reasons stated, the Trustee urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



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